ALBERTA IN A NEW CANADA

A DISCUSSION PAPER FROM THE CONSTITUTIONAL REFORM TASK FORCE OF ALBERTA

91-03387/

There will be plenty of opportunity for Albertans in every part of our province to make their views known on the important constitutional issues that face our province.

Stan Schumacher,
Vice-Chairman, Task Force

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LETTER TO ALL ALBERTANS

Only months ago, discussions about the Meech Lake Accord placed Canada's Constitution high on the country's agenda. Canadians found themselves in a debate not only on what changes should be made to the Constitution, but on how Canadians should be involved in making those changes.

A consensus was not reached and the Accord was not ratified. This has caused many Canadians to begin a broader and more fundamental examination of our national community. Alberta must be prepared not only to respond to suggestions for change coming from other parts of the country, but also be ready to advance Alberta's views on the future course for Canada.

ALBERTA IN A NEW CANADA raises issues on various systems of government, federal institutions, the division of responsibilities between the federal and provincial governments, fundamental rights and freedoms, bilingualism, aboriginal constitutional matters, and the amending formula. It asks questions; it does not offer recommendations or solutions. We hope that you will find it to be thought-provoking.

This discussion paper provides one way of entering the debate on Canada's future. Take the time to read it. Write down your views and send them to us. **Call 1-800-661-3741** with your ideas. Become involved in the public hearings and other activities. Help develop an Alberta position on constitutional reform.

The issues are difficult and complex, but they are important. The debate is about almost everything it means to be Canadian. It is about Alberta in a new Canada.

The Constitutional Reform Task Force of Alberta

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ALBERTA IN A NEW CANADA

The character and dynamics of Canada have changed drastically in the 123 years since our federal system and political institutions were established. Recent events have forced us to think about those changes and the need for constitutional reform. In fact, since the collapse of the Meech Lake Accord and with subsequent opinions and events in Quebec, the nature of the country itself may be at stake.

The Constitution has seldom been a priority for most Canadians. We have been more concerned with our families and communities...with taxes and the economy...with employment...with health and the environment — matters which touch our everyday lives. Yet, we recognize that our political system and our institutions of government — the House of Commons, the Senate, and provincial Legislative Assemblies — have a direct bearing on our quality of life. If our political institutions are properly designed and serve us well, they can promote our common values and help secure our future in an increasingly competitive world. If they no longer adequately serve Canada's needs, they can create divisions and keep us from fulfilling our aspirations. As Albertans and Canadians, we must meet the important constitutional challenges that are confronting our nation.

This discussion paper is the second phase of a broader public consultation process undertaken by the Constitutional Reform Task Force, established by the Government of Alberta in August 1990. The purpose of the Task Force is to seek the views of Albertans on a constitutional framework for a new Canada. In the first phase, 13 Canadians were invited to present their opinions on constitutional options and alternatives to the Task Force and interested members of the public. Quotations from those four roundtable discussions held in Edmonton and Calgary can be found throughout the paper. ✱

> We want this to be the most comprehensive review of the Constitution ever undertaken in Alberta.
>
> Hon. Jim Horsman, Chairman, Task Force

✱ **Copies of the transcripts from the roundtable discussions are available by calling 1-800-661-3741.**

This discussion paper identifies and describes various constitutional issues which we are facing, and presents some options and alternatives for us to consider. It is not a blueprint for change. It contains no recommendations. It is intended to raise awareness . . . to stimulate personal involvement ... and to encourage public debate.

> The first thing we have to do is get it very clear in our heads that things are now catastrophically different than the way they were 25 or 30 years ago.
>
> Ted Byfield, Publisher, B.C. Report

As a next step, public hearings in communities throughout the province will be held before the Alberta Legislative Assembly's position on constitutional reform is developed.

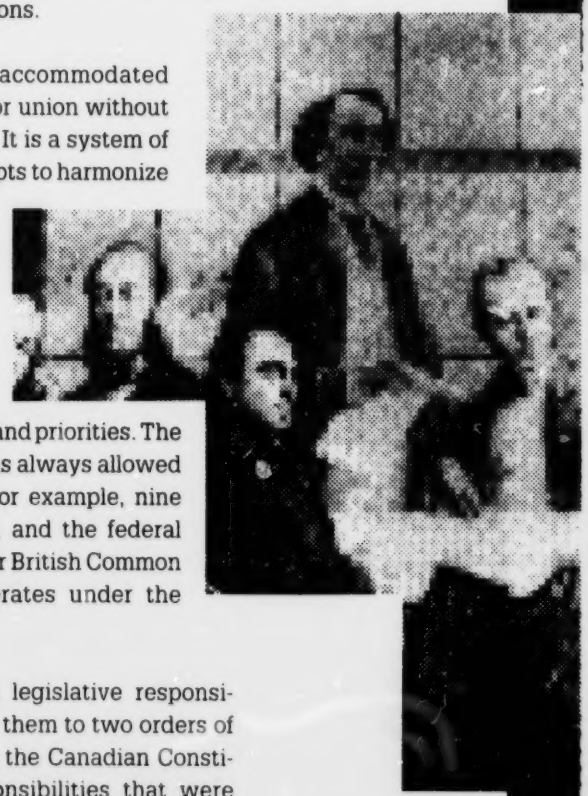
Albertans have expressed strong opinions on constitutional reform and the importance of public involvement in the process. This is an opportunity for interested Albertans to share their visions of Alberta in a New Canada.

As an Albertan, how would you design the Constitution for a new Canada?

> We have the opportunity to build a constitutional reform package that will strengthen Canada, rather than weaken it.
>
> Dr. David Elton, President, Canada West Foundation

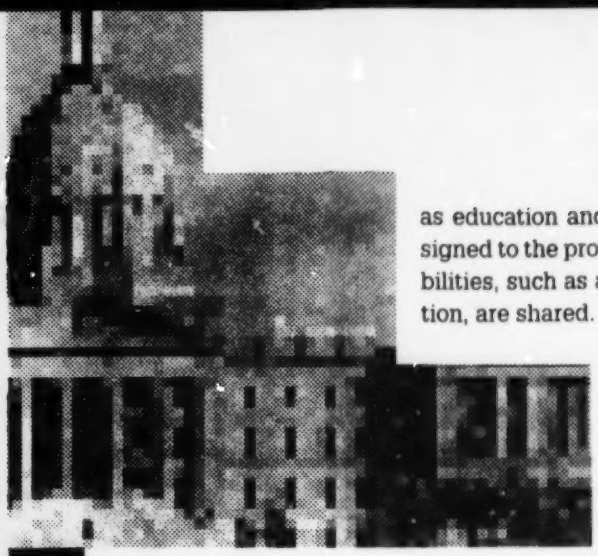
CANADIAN FEDERALISM AND OTHER SYSTEMS

Canada was created in 1867 when the British North American colonies joined together to become a single nation under a parliamentary system of government. The Fathers of Confederation examined several forms of government. Because of Canada's immense geographic size, its widely scattered population and the great diversity of its peoples, they chose to combine British parliamentary democracy with a federal system of government under our Constitution. Parliament consists of the Queen, the Senate and the House of Commons.



Federalism accommodated Canada's need for union without imposing uniformity. It is a system of government which attempts to harmonize competing desires: the desire to unite to form a larger, more effective political union, and the desire to recognize and preserve regional economic, social, cultural and linguistic differences and priorities. The Constitution of Canada has always allowed for these differences — for example, nine provinces, the territories, and the federal government operate under British Common Law, while Quebec operates under the French Civil Code.

Federalism divides legislative responsibilities and assigns them to two orders of government. Under the Canadian Constitution, those responsibilities that were considered national in nature, such as defence and currency, are assigned to the federal government. Those that allowed regions to express their differences, such



as education and social services, are assigned to the provinces. Certain responsibilities, such as agriculture and immigration, are shared.

Canada has fundamentally changed since 1867 — yet the division of responsibilities has remained essentially the same. The role of governments in providing public services has grown dramatically — but it has become increasingly difficult for governments to meet all the competing demands for services.

Do Albertans agree on the appropriate balance between national objectives and regional diversity? Will other Canadians agree? Do we believe the current federal system provides enough flexibility for Alberta to succeed as a province — or Canada as a nation — as we head into the 21st century?

The Choices It is time for Albertans and all Canadians to re-examine our federal system. We should understand a wide variety of government systems in order to make an informed choice about which most appropriately meets the goals and aspirations of Canadians. Each would provide the framework for a new Canada ... each would reflect different visions of our national community.

Unitary System — Within a unitary system of government, there are no regional or provincial governments and, with the exception of municipal issues, the responsibilities of government rest with the national legislature. There is no division of responsibilities. All major decisions are made by a single government. The classic example of this form of government is the United Kingdom.

Would a unitary system meet the needs of a country as large and diverse as Canada?

Federal System — Within a federal system, responsibilities are divided between federal and provincial governments. There are a number of countries which chose federal systems of government, including Canada, the United States, Australia, and Germany. In each country, the federal system was adapted to suit particular needs.

Canada could retain its federal system but adjust certain areas to meet contemporary needs. This fine-tuning could involve reshaping the institutions of government as well as redistributing the division of responsibilities.

> Can we find creative solutions which will allow this remarkable experiment in nation building to continue?
>
> Dr. Peter Meekison, Vice President, University of Alberta

What functions are most appropriately performed by the federal government? Which ones should be performed by the provinces? Should the federal government have more or less responsibility? What about the provinces? Is Canada too centralized? Is it too decentralized? Should we keep our parliamentary system? Should a province or region be allowed to leave Confederation? If so, how?

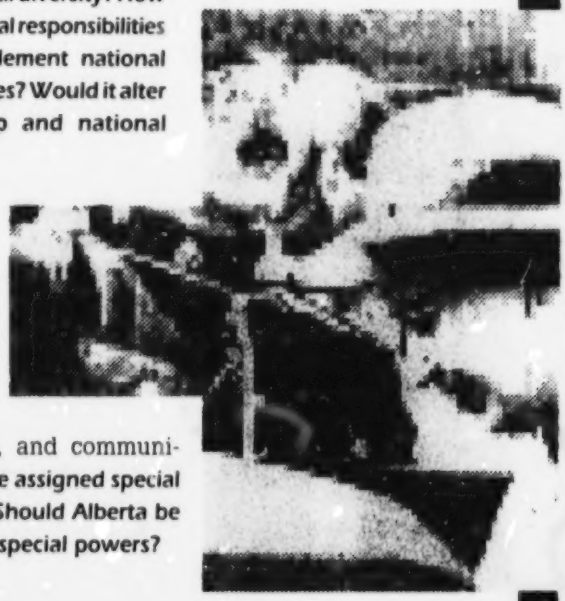
> In a country as vast as Canada, some type of federal arrangement is almost inevitable and required.
>
> Dr. Peter Meekison, Vice President, University of Alberta

Canada is a constitutional monarchy, and the Queen currently serves as our head of state. **Is this still appropriate today? If not the Queen, who should fill the role as the head of state of Canada?**

Varying Status Federalism — Under this system, the distribution of responsibilities between the federal government and the provinces are not the same across the country. This is sometimes described as "asymmetrical federalism". In Canada, for example, many English and French language provisions in the Constitution do not apply equally across the country — separate and different ones apply to various provinces. Similarly, different arrangements apply to other matters such as education. To some extent, therefore, Canada already could be considered to have an asymmetrical federal system. In most areas, however, the Constitution applies equally to all provinces.

> The issue of reconciling provincial equality with provincial asymmetry is one of the crucial ones that faces us.
>
> Dr. Ron Watts, Director, Queen's University Institute of Intergovernmental Relations

Different provinces have different capacities and resources to meet their constitutional responsibilities, depending on their size, the strength of their economies, and demographics. **Should all provinces have the same constitutional responsibilities? Would varying responsibilities represent constitutional inequality, or would this be another way of expressing provincial diversity? How would varying constitutional responsibilities affect our ability to implement national social and economic policies? Would it alter our sense of citizenship and national identity?**

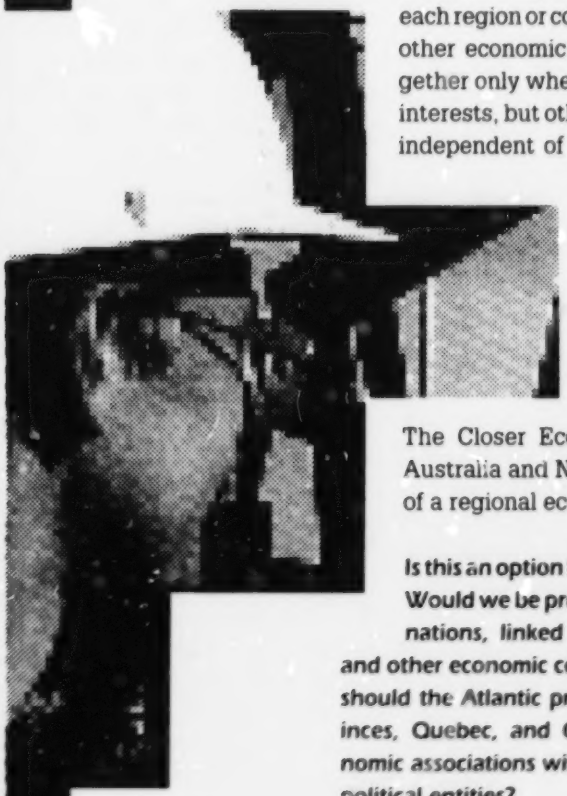


Quebec, for example, argues that it has unique social, cultural and linguistic concerns. Historically, it has been very sensitive to its own needs in language, immigration, education, and communications. **Should Quebec be assigned special powers in certain areas? Should Alberta be seen as unique and have special powers?**

Confederal System — Within a confederal system of government, a number of independent countries form a union in which each agrees to give certain powers — usually over monetary and economic policies — to a central authority. Each country remains independent except in those matters where they have agreed to be bound by the central authority. The European Community is often cited as an example of a political association that is rapidly moving toward this form of government.

A complication in confederal governments is how individual countries, unequal in population, are represented in the central authority. **How do you protect the interests of the smaller units? Is each given an equal voice regardless of size? Could Canada operate better this way? If we formed a confederal union of countries, could we still be "Canadians"?**

Regional Economic Associations — Under this system, neighbouring, politically independent regional governments establish economic associations. Each regional government is an independent nation, but rather than formally uniting in a confederation, each region or country negotiates trade and other economic agreements. They act together only where it is in their mutual best interests, but otherwise remain completely independent of one another. This type of arrangement is difficult to negotiate, and can have the drawback of being terminated on relatively short notice, possibly contributing to economic instability for one or more of the partners. The Closer Economic Relation between Australia and New Zealand is an example of a regional economic association.



Is this an option for the provinces of Canada? Would we be prepared to form independent nations, linked only by trade agreements and other economic considerations? For instance, should the Atlantic provinces, the Western provinces, Quebec, and Ontario form regional economic associations within Canada, or as separate political entities?

SUMMARY

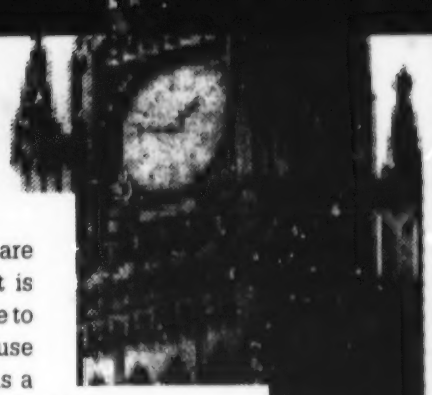
The variations within, between and among these different systems of government are endless. A distinguishing characteristic is the amount of power given to the central authority, and that held by the regional units. In re-designing our Constitution, we could be as creative and as innovative as the Fathers of Confederation were in their choices.

How much and what types of responsibility do we want a federal government to exercise on our behalf? How much responsibility do we want provinces to exercise on our behalf? What should be the responsibilities of municipal governments? What should be the responsibilities of each citizen? These questions will be the heart of the upcoming national debate.

FEDERAL INSTITUTIONS

The division of responsibilities within our federal system of government is in response to the great diversity of this country and its various regions — and in recognition that certain decisions must be made locally if they are to be most effective.

Regional diversity, however, should not be reflected solely at the local level. It also must be accommodated within the national decision-making process. For this reason, the federal parliament is made up of two houses — the House of Commons and the Senate.



The House of Commons is designed to reflect the democratic principle of representation by population. A consequence of this design, however, is that representation in the House of Commons is dominated by the provinces with the greatest population and, thus, the greatest number of seats. Since Ontario and Quebec have approximately 60 per cent of the seats in the House of Commons, some are concerned that the decisions of the House may tend to favour those two provinces. This can lead to frustration in the less populous areas of the country because, if citizens do not believe that the federal government is capable of accommodating their perspectives — if they feel their concerns are being ignored — they will lose confidence in the ability of the national government to represent their interests.

> A Canada without Quebec would not be a good idea . . . Ontario would become 49 percent of the population . . . . . no federation that I know of where a single unit has been that high a proportion has been stable or survived.
>
> Dr. Ron Watts, Director, Queen's University Institute of Intergovernmental Relations

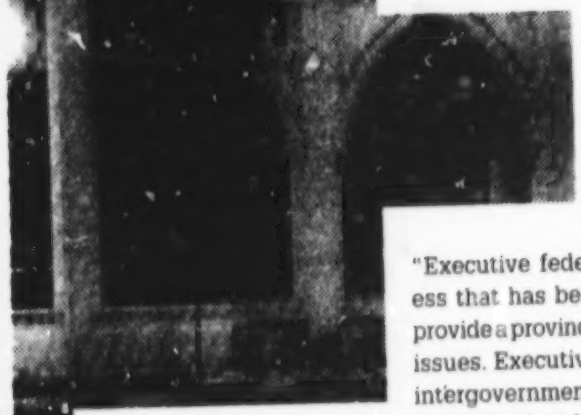
Accordingly, when Canada was formed, an Upper House — the Senate — was created to be the voice of regional concerns. The Senate was established on the basis of equal regional representation. Its role was to act as a house of "sober second thought", and to represent and protect regional interests in the national decision-making process. The House of Commons and the Senate were to act together as a single Parliament to express the national will.

The Senate has not proven to be an effective voice for regional or provincial interests. The Senate rarely blocks legislation which comes from the Commons because Senators are appointed rather than elected, and it is considered inappropriate for the Senate to override the views of the elected House of Commons. As a result of this "rubber stamping" exercise, frustrations have been allowed to build.

It is in response to this problem that the Government of Alberta has promoted the Triple E Senate reform model. The Senate would be elected to give it credibility . . . effective to give the Senate a real say in national decisions . . . with an equal number of members from each province. ***Is the Triple E Senate reform model — or Senate reform at all — the best method to ensure that the views of all the regions of the country are taken into account in national decision-making? Should Senate reform remain a priority for the Government of Alberta?***

> A Triple E Senate has been something Alberta has been very interested in with respect to serving Alberta's interests.
>
> Jack Ady, Task Force Member

Regional interests can be accommodated within national institutions in a number of other ways. The federal Cabinet, for example, has traditionally had representation from all regions of Canada. This practice, though, has its limits since, at times, national governments have held few or no seats in some areas of the country, making it difficult to maintain a regional balance. It also has been suggested that the principles of Cabinet



solidarity and party discipline may limit the ability of our national parties to integrate regional interests.

"Executive federalism" is another process that has been developed, in part, to provide a provincial voice on national policy issues. Executive federalism is a term for intergovernmental discussions between the executives (Cabinets) of both orders of government. These discussions are aimed at exchanging views and coordinating the activities of governments. The main instrument of executive federalism is the First Ministers' Conference. The Constitution does not directly recognize these Conferences as an ongoing decision-making process. **Is executive federalism good for Canada? Should the Constitution entrench First Ministers' Conferences? Should all decisions taken at these conferences require ratification by Parliaments and provincial Legislatures?**

Other federal institutions, such as the Supreme Court of Canada, and federal administrative bodies, such as the National Energy Board, the Wheat Board, and the Canadian Radio-Television and Telecommunications Commission, also can represent regions through their composition. **Should there be a constitutional requirement for regional representation on the Supreme Court, and various federal administrative and regulatory bodies?**

Some have suggested that if the House of Commons was elected on the basis of proportional representation, it would better represent the diversity of the population. Proportional representation is an electoral system in which the number of seats a political party holds in a legislative assembly is based upon its proportion of the popular vote, rather than on the number of individual constituency victories. In other words, if a party attracted 25 per cent of the popular vote in an election, it would be entitled to roughly 25 per cent of the seats in the assembly. Others have argued that proportional representation would result in unstable minority governments. **Would other mechanisms, such as electoral reform, enhance the representative functions of our national institutions?**

DISTRIBUTION OF RESPONSIBILITIES

As in other federations, the distribution of responsibilities between the federal and provincial governments are outlined in the Constitution. In Canada, this division was established in 1867 and, with few exceptions, has remained virtually unchanged.

> The salvation of the country perhaps will be found in a re-federated Canada with a new distribution of powers.
>
> Fred Bradley, Task Force Member

> We need and must not settle for less than institutional mechanisms for protecting regional interests and ensuring the equitable treatment of Canadians, regardless of where they live.
>
> Dr. David Elton, President, Canada West Foundation

Basically, the federal government was granted responsibility for matters considered to be of national concern and scope. The provinces were given responsibility for matters which were considered more local in nature — those affecting the social and cultural well-being of our communities, including education, and the development of our economies. (Of particular importance to Alberta was that it have ownership, management and control of natural resources, which it gained in 1930.) The initial idea was to keep the responsibilities of each order of government as separate as possible. However, agriculture and immigration are two areas of shared responsibility.

With the demand for new public services, the responsibilities of government have grown considerably over the years and have become more complex. Governments are now providing services that were not even contemplated at Confederation. Increasingly, there is the potential for overlap and duplication in the delivery of those services. The division of responsibilities has become blurred, and can result in competition and conflict between the federal and provincial governments. Conflict and competition are expensive.

> Merely recognizing diversity does not hold the nation together - Canada is about balance.
>
> Hon. Nancy Betkowski, Task Force Member

Our federal system and our institutions of government should be flexible in order to respond and adapt to change both within Canada and around the world. **How does the division of responsibilities affect the ability of governments to work together in securing sustained social and economic progress? Does our federal system frustrate or help Canadians meet the challenges of the future?**

Economic Policy There is a direct relationship between the economy and the Constitution. Both the federal and the provincial governments exercise considerable influence over economic matters. The federal government was granted responsibility over areas essential to maintaining an integrated national economy — currency, banking, monetary policy, and the regulation of interprovincial and international trade and commerce. The provinces have responsibility for a wide variety of other economic matters. Provincial laws and regulations in relation to property, natural resources, environment, contracts, labour, securities and taxation can, and do, have significant implications for the operation of our national economy. Moreover, a prosperous economy requires stable and secure political arrangements. Uncertainty about our constitutional and political future shakes investor confidence and inhibits the realization of our economic objectives.

> The economy and the Constitution are inextricably interwoven.
>
> Hon. Jim Horsman, Chairman, Task Force

Some commentators have suggested that our current constitutional framework can impede economic growth and can establish barriers to trade. There is a concern that overlapping responsibilities can lead to duplication and over-regulation. The financial industry is a good example — the federal government has responsibility over banking and insurance, yet the provinces regulate trust companies and brokerage firms. **Does this lead to confusion and economic inefficiencies? Is some duplication inevitable?**

As the economies of the provinces have become more and more complex, they have adapted by developing their own regulations, product standards, licensing requirements, and procurement practices. These regulations can vary from province to province, and can create significant interprovincial barriers to trade.

I would like to see the rest of Canada develop a constitutional agenda of its own . . . that's exactly what Quebec is doing right now.

Lise Bissonnette, Publisher, Le Devoir

The argument has been made at times that a clearer division of economic responsibilities in the Constitution would improve the functioning of the Canadian economy. It has been suggested that a list of guiding principles or rules governing the treatment of goods, services and factors of production would improve economic efficiency. **Should a set of economic principles be placed in the Constitution? What powers should the federal government have in order to protect the Canadian economic union? Would these powers limit the ability of the provinces to tailor economic programs to the benefit of the local population or to attain particular social, economic or cultural objectives? Should the provinces have a say in monetary policy such as interest rates?**

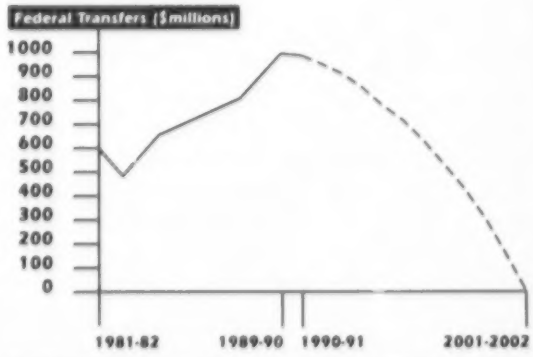
Is the goal of economic efficiency our priority as a nation? How does the distribution of economic powers affect the ability of the federal government to meet its responsibilities for reducing regional disparities and promoting equality of opportunity across the country?

Social Policy At Confederation the provinces were given responsibility for providing numerous services including health care, education and social services. In 1988, the Government of Alberta released *Caring and Responsibility: A Statement of Social Policy for Alberta*, which pointed out that "social policy — to be effective — should not be developed independently of the economic environment". It could be added that social policy and the economic environment cannot be considered independently of the constitutional arrangements under which they operate.

Canada has a society which has taken care of its poor and its disadvantaged . . . a society with heart . . . with a social safety net, that most Canadians support.

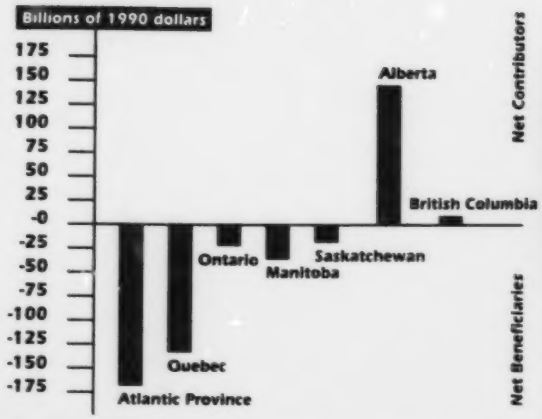
Dr. David Bercuson, Dean of Graduate Studies, University of Calgary

One of the most challenging aspects of the Constitution as it relates to social policy is the dramatic imbalance between the responsibilities of the provinces to provide social services, and their ability to raise sufficient revenues to pay for the programs. As a result, we have seen the growth of elaborate taxation policies, shared-cost programs and fiscal arrangements between the federal and provincial governments. This blurs the lines of responsibility, makes it more difficult to budget, and greatly complicates the effective delivery of services. Moreover, Ottawa targeted transfers to provinces for major cutbacks, particularly in the 1990-91 budget. If the trends continue, Alberta may receive no federal transfers for health and post-secondary education within a decade.



Federal Transfers to Alberta for Health and Post-Secondary Education — Actual; - - - Projected

What is the most appropriate way to ensure the efficient delivery of our broad range of social services? One approach could be to grant the provinces additional personal and corporate income tax authority, or "fiscal room". Another approach could be to assign the federal government more responsibility for social services.



FISCAL BALANCE

Fiscal Balance in Canada: Federal Revenue Collected from Provinces Minus Federal Transfers and Expenditures into the Provinces, 1961 to 1988. Based on work by Mansell, Schlenker, 1990.

> The federal government collects tax on behalf of the provinces . . . every time the federal government changes its tax, our tax gets changed automatically.
>
> Dr. Paul Boothe, University of Alberta

Should the Constitution require minimum federal transfers to the provinces to ensure the delivery of social services? Should the federal government be allowed to attach certain conditions or minimum standards to federal transfers? Would national standards hamper the ability of the provinces to respond in a timely fashion to local needs and interests?

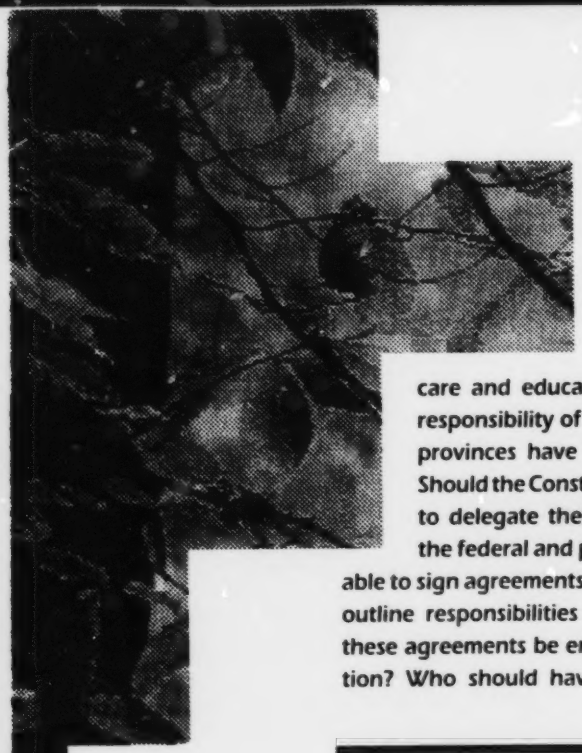
OTHER CONSIDERATIONS

There may be a need to reconsider the distribution of responsibilities in other areas such as trade, communications, fisheries, transportation and culture. Additional issues which have been a source of friction from time-to-time include responsibility for immigration, vocational training, and protection of the environment.

One solution to questions about the distribution of responsibilities is to clarify the wording of the Constitution. For example, in 1982, the division of responsibilities was amended to clarify provincial jurisdiction over natural resources.

Several other approaches can be taken. First, one order of government could delegate certain responsibilities to another. This has occurred in certain limited areas already. For example, the federal government has responsibility for interprovincial transportation. In practice, however, the federal government has delegated regulatory authority over motor transport to provincial boards. This relationship works well and could be applied elsewhere. A second approach could be to negotiate federal/provincial bilateral arrangements which would affect only the province involved. In other words, the federal government could give up certain responsibilities to a province or vice versa. Such an arrangement could accommodate concerns unique to a province without involving other provinces. If they so desired, other provinces could make similar arrangements.

A third approach would be to allow provinces to "opt into" or "opt-out-of" federal programs. Under this approach, if a province opposed a federal program, the province could decide not to participate in the program and not have it apply within its borders.



Should the federal government be constitutionally responsible for the delivery of more services, such as health care and education, which are now the responsibility of the provinces? Should all provinces have identical responsibilities? Should the Constitution allow governments to delegate their responsibilities? Should the federal and provincial governments be able to sign agreements or bilateral accords which outline responsibilities in certain areas? Should these agreements be entrenched in the Constitution? Who should have the final responsibility for environmental matters? Should the federal government be responsible for certain programs but allow the provinces to "opt-in" or "opt-out" depending on their needs?

> Is it possible for powers to be delegated to provinces which would satisfy the needs of Quebec as well as the needs of Alberta and other parts of the country?
>
> Hon. Dennis Anderson, Task Force Member

FUNDAMENTAL RIGHTS AND FREEDOMS

One of Canada's most enduring political traditions is its respect for fundamental human rights and freedoms. Historically, the fundamental rights of Canadians always have been protected in a number of ways — by the democratic character of our society and political institutions...by our traditional respect for civil liberties...by the principle of the rule of law which is maintained in an independent and impartial judiciary. The Constitution of Canada, however, with the exception of certain linguistic and educational guarantees, did not specifically provide constitutional protection for the rights and freedoms of Canadians until quite recently.

> The Charter of Rights and Freedoms is the most significant constitutional change in our country's history since 1867.
>
> Professor Anne McLellan, University of Alberta

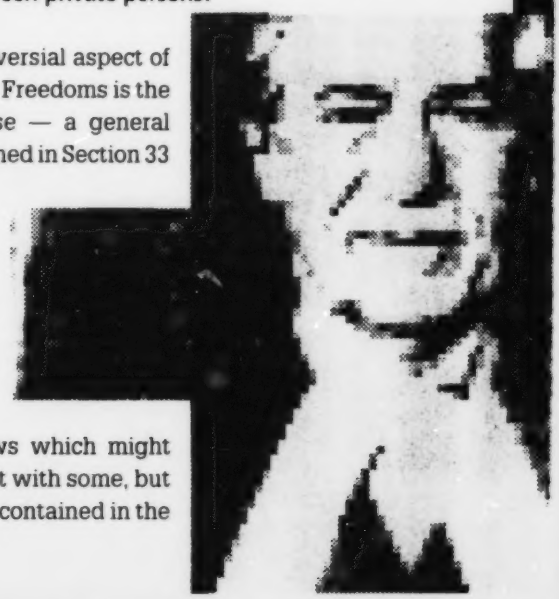
In 1960, almost 100 years after Confederation, the federal government adopted the *Canadian Bill of Rights*. In 1972, the province of Alberta approved the *Alberta Bill of Rights*. While these and similar pieces of legislation across the country guarantee certain rights and freedoms, they are not part of the *Constitution Act* and can be amended by a simple legislative majority. This led to calls in the late 1970s and early 1980s for constitutional protection of rights. The *Constitution Act* was amended in 1982 to include a Charter of Rights and Freedoms.

The Canadian Charter of Rights and Freedoms provides certain fundamental guarantees — democratic and legal rights; the rights of equality and mobility; minority language education rights; freedom of religion; and freedom of expression. **Do we have more rights and freedoms now than before we had the Charter?**

The entrenchment of the Charter of Rights and Freedoms was not achieved without some controversy, and it has clearly altered Canada's constitutional framework. The Charter has affected the role of the courts and the relationship between citizens and their governments. No longer are Parliament and the provincial Legislatures supreme in their own legislative fields of responsibility. All laws and government activities must now conform to the protections set out in the Charter. The courts determine which laws are consistent with the Charter.

As Canada approaches nearly a decade of experience with the Charter, it is useful to examine whether the Charter has fulfilled its expectations and objectives, or whether certain changes should be made to ensure that it is best serving the needs of Canadian society. While the Charter is a fairly comprehensive document, some people have suggested there may be a need to clarify particular provisions, or to include other rights and freedoms within its terms. Property rights, for instance, are not specifically mentioned in the Charter, but are regulated by a wide variety of provincial legislation. **What are the advantages or disadvantages of inclusion of such provisions in the Charter? Do certain provisions of the Charter require clarification to more clearly articulate their original intent? Should additional rights and freedoms be protected under the Charter? How do you balance individual rights with the needs and interests of society as a whole?**

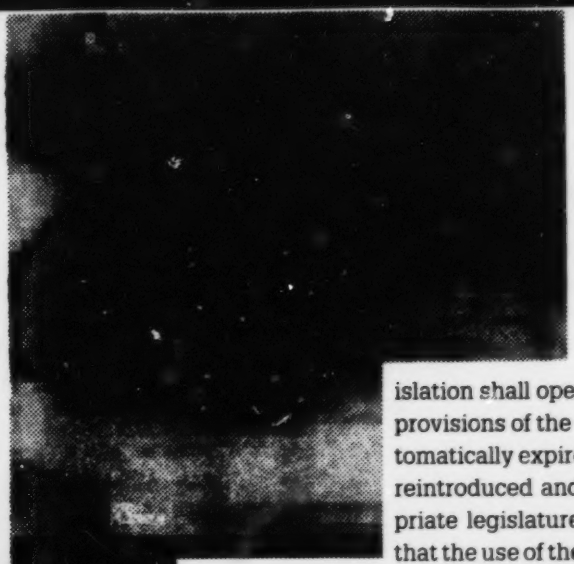
Another important issue is the application of the Charter of Rights and Freedoms. The Charter was designed only to apply to the relationship between governments and individuals. It was never intended to regulate activities between private persons. Indeed, many of the guarantees — such as democratic, legal and minority language education rights— by their very nature apply only between governments and individuals. Protection against the possible violation of rights between private persons is regulated by other human rights codes, such as the *Alberta Individual's Rights Protection Act*, the common law, and a wide variety of federal and provincial legislation, such as the *Criminal Code* or the *Law of Property Act*. **Should the Charter be amended to apply to relations between private persons?**



Perhaps the most controversial aspect of the Charter of Rights and Freedoms is the "notwithstanding" clause — a general override provision contained in Section 33 of the Charter. The inclusion of this provision is a complex issue upon which opinion is often passionately divided. The notwithstanding clause allows Parliament and provincial Legislatures to pass laws which might otherwise be inconsistent with some, but not all, of the guarantees contained in the Charter.

> Leaders from all walks of life . . . must make it very clear to Canadians that they are earnestly trying to understand the many voices that are speaking in this country.
>
> Fernand Landry, former Deputy Minister, Premier's Office, Government of New Brunswick

The override provision was considered necessary to ensure that the duly elected legislatures, not the courts, have the final say in important matters of public policy. Outside the extremely difficult process of constitutional amendment, this is the only way to reverse any unpopular interpretations of the Charter by appointed courts.



The use of the override provision requires Parliament or a provincial Legislature to expressly declare that the legislation shall operate notwithstanding the provisions of the Charter. The override automatically expires in five years unless it is reintroduced and approved by the appropriate legislature. The time limit ensures that the use of the clause is reassessed and publicly debated at least once every five years to reconfirm that it serves a valid public purpose. This clause was used in 1988, when the Government of Quebec invoked the provision to override a Supreme Court decision dealing with the use of English and French in the province.

Some people have argued that the notwithstanding clause diminishes the value of the Charter by allowing Parliament and Legislatures to override certain of its guarantees. Others contend that rights are not absolute and must be considered within the broader needs of a democratic society. **Who should have the final say in making laws, democratically elected representatives or the courts? Should the notwithstanding clause be kept in the Charter? Should additional restrictions be placed on the use of the notwithstanding clause?**

BILINGUALISM

Section 133 of the *Constitution Act, 1867* provided the original broad constitutional guidelines for the official use of the English and French languages in Canada. The section stated that either language could be used in the Canadian Parliament and the Quebec Legislature, that records of these Assemblies were to be kept in both languages, and that all Acts of the Canadian Parliament and the Quebec Legislature were to be published in both languages. In addition, either language could be used in proceedings before any Court of Canada and any Court of Quebec.

These constitutional guidelines remained unchanged for over 100 years, though there were significant policy and legislative changes during that time. One of the most significant changes was the adoption by the Government of Canada in 1969 of the *Official Languages Act*, which declared the English and French languages to be the official languages of Canada. The Act also required that federal services to the public be provided in both English and French.

In 1982, several language provisions were entrenched in the Charter of Rights and Freedoms including the key component of the *Official Languages Act*. Section 16 of the Charter of Rights declared that "English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada." In addition, New Brunswick institutions were placed under similar bilingual requirements. The 1982 Constitution also entrenched minority language education rights. Minority language education rights gave parents whose mother tongue was either of the official languages, or who were educated in Canada in either language, the right to have their children educated in that same language. This right applies wherever the number of children is sufficient to warrant the expenditure of public funds. This section, however, provides no guidance on what number of children should be considered sufficient.

In 1988, the Alberta *Languages Act* made English the official language of the Alberta Legislature.

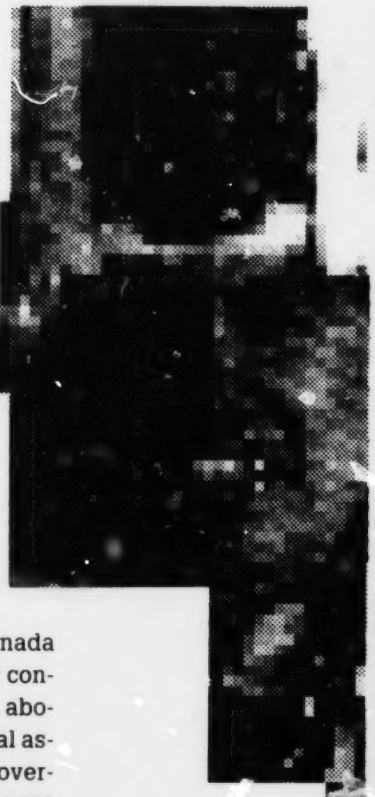
Should Canada have two official languages? Should the provision of some bilingual provincial services be entrenched for all provinces? Should the Constitution clarify what it means by sufficient numbers to warrant public funding of minority language instruction, or should this be left to governments and the courts to address on a case by case basis?

ABORIGINAL CONSTITUTIONAL MATTERS

Before the arrival of the Europeans, aboriginal people controlled their affairs through their own laws, rules and customs. This situation continued for several hundred years following the arrival of the first settlers. Starting in the mid-1700s, various proclamations, treaties and other instruments listed and tried to define various aboriginal rights. The *Constitution Act, 1867* gave the Parliament of Canada exclusive legislative authority for "Indians, and lands reserved for Indians".

In 1982, the Constitution was amended to include recognition of existing aboriginal and treaty rights; to define "aboriginal peoples of Canada" as Indian, Inuit and Metis; and to guarantee a First Ministers' Constitutional Conference to discuss the identification and definition of the rights of aboriginal peoples. In 1984, the Constitution was further amended to recognize and affirm rights that may be acquired through land claims agreements; to guarantee aboriginal and treaty rights equally to both genders; and to guarantee an additional two First Ministers' Conferences on Aboriginal Matters.

There was extensive constitutional discussion between 1983 and 1987 devoted almost exclusively to aboriginal matters. The central focus was debate on aboriginal self-government. Governments and aboriginal leaders, unable to reach agreement on defining self-government, failed to determine whether and how the right could be placed in the Constitution. Some felt that if the right to self-government was contained in the Constitution without being adequately defined, it would be left to the courts to define exactly what it means.

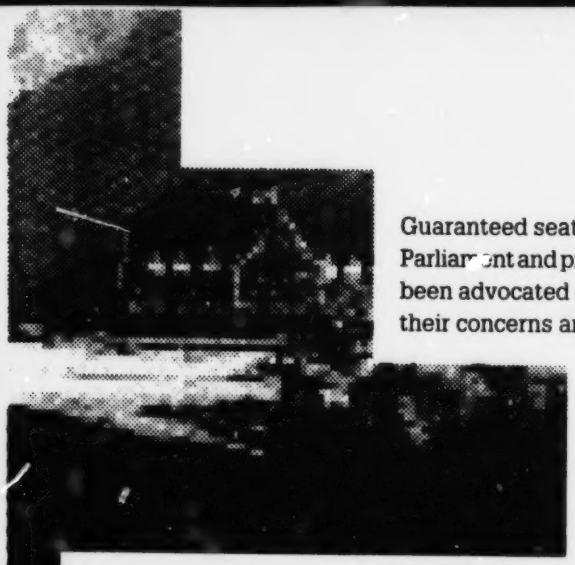


Our aspirations are no less significant or less intense than those in Quebec.

Andrew Bear Robe
Constitutional Advisor,
Siksika Nation

There is recognition in Canada that there must be further constitutional discussions on aboriginal matters. Aboriginal aspirations range from a sovereign form of self-government with Indian Bands and the federal government dealing on a nation-to-nation basis, to a form of local self-government with some responsibilities similar to those of a municipal government and other powers similar to those of a provincial government. It also has been suggested that Indian Bands could form an eleventh province, consisting of many geographically separated land bases, with all the constitutional authority and economic powers of a provincial government. **How can aboriginal concerns best be resolved in Canada?**

How are smaller reserves, if recognized as individual nations, to do all that governments do given the limited dollars available to them? Pearl Calahasen, Task Force Member



Guaranteed seats for aboriginal people in Parliament and provincial legislatures have been advocated as a way of ensuring that their concerns are directly represented in governments. **Should guaranteed seats be provided to aboriginal people in the House of Commons, the Senate, and provincial legislatures?**

AMENDING THE CONSTITUTION

The purpose of the amending formula is to establish special rules and procedures which must be followed before any changes to the Constitution can be made. It is imperative that people agree with the procedures required to amend the Constitution — if Canadians do not support the process by which the Constitution has been changed, they are unlikely to support the change itself.

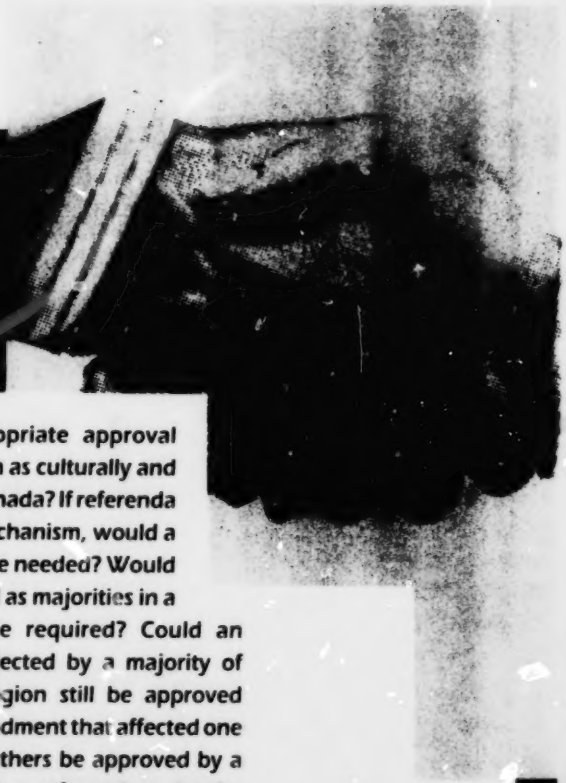
> Change in the amending processes will not create national consensus, though it can facilitate it.
>
> Dr. Stephen Scott, McGill University

In a federation as diverse as Canada, the most appropriate way to amend the Constitution is a very complex issue. The formula must balance and accommodate a number of competing demands. It must establish special conditions to ensure constitutional stability and prevent unnecessary changes. Yet, it must be flexible enough to allow the Constitution to evolve in response to the needs of contemporary society. As well, the amending formula must be carefully designed to ensure that the interests of national majorities are balanced against the interests of regional minorities.

It was not until 1982 — after more than 50 years of negotiations — that Canada finally adopted a domestic procedure to amend its Constitution. Our entrenched amending formula is probably the most technically complex in the world. It provides for several ways to make changes. Some amendments — including those affecting the Office of the Queen and the amending formula itself — are considered so important they require unanimous consent. Under the general amending procedure, most amendments can be made with the consent of Parliament and the Legislatures of seven provinces with at least 50 per cent of the population of Canada. No one province has a veto under the formula. This general amendment procedure also contains an important provision by which any province, by resolution of its legislature, can prevent the taking away of any of its rights, powers and privileges. Therefore, no province can have its jurisdiction altered or taken away without its consent. Amendments to the provisions of the Constitution that do not apply to all provinces — like altering provincial boundaries or certain language rights — can be made by Parliament and the Legislative Assemblies of those provinces concerned. Other amendments to the executive governments of Parliament and the provinces can be made by ordinary statute.

The recent debate about the Meech Lake Accord, however, has raised important questions about whether or not the current amending formula provides the most appropriate method to change the Constitution. In particular, some people are wondering whether alterations could be made to the formula to make it easier to achieve constitutional amendments. Others would like to see more direct public participation in the amendment process.

> Canadians no longer accept the traditional argument that constitutional amendment is government business exclusively.
>
> Dr. Allan Tupper, Chairman, Department of Political Science, University of Alberta



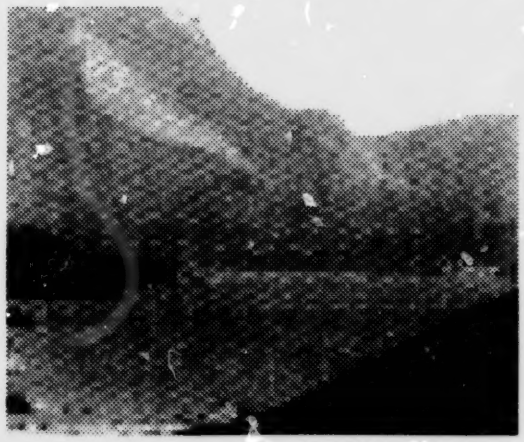
Current procedure requires legislative action for the approval of amendments, but not direct public participation. While there is growing consensus for greater public involvement, there is less agreement on how this should be achieved.

Greater opportunities for public involvement could be achieved either by changing the amending formula, or by adding certain steps to the amending process. For example, the federal and provincial governments could adopt legislative requirements to conduct public hearings on proposed amendments. **Should such hearings be conducted separately by the federal government and each of the provinces? Should a joint federal-provincial commission review proposed amendments?**

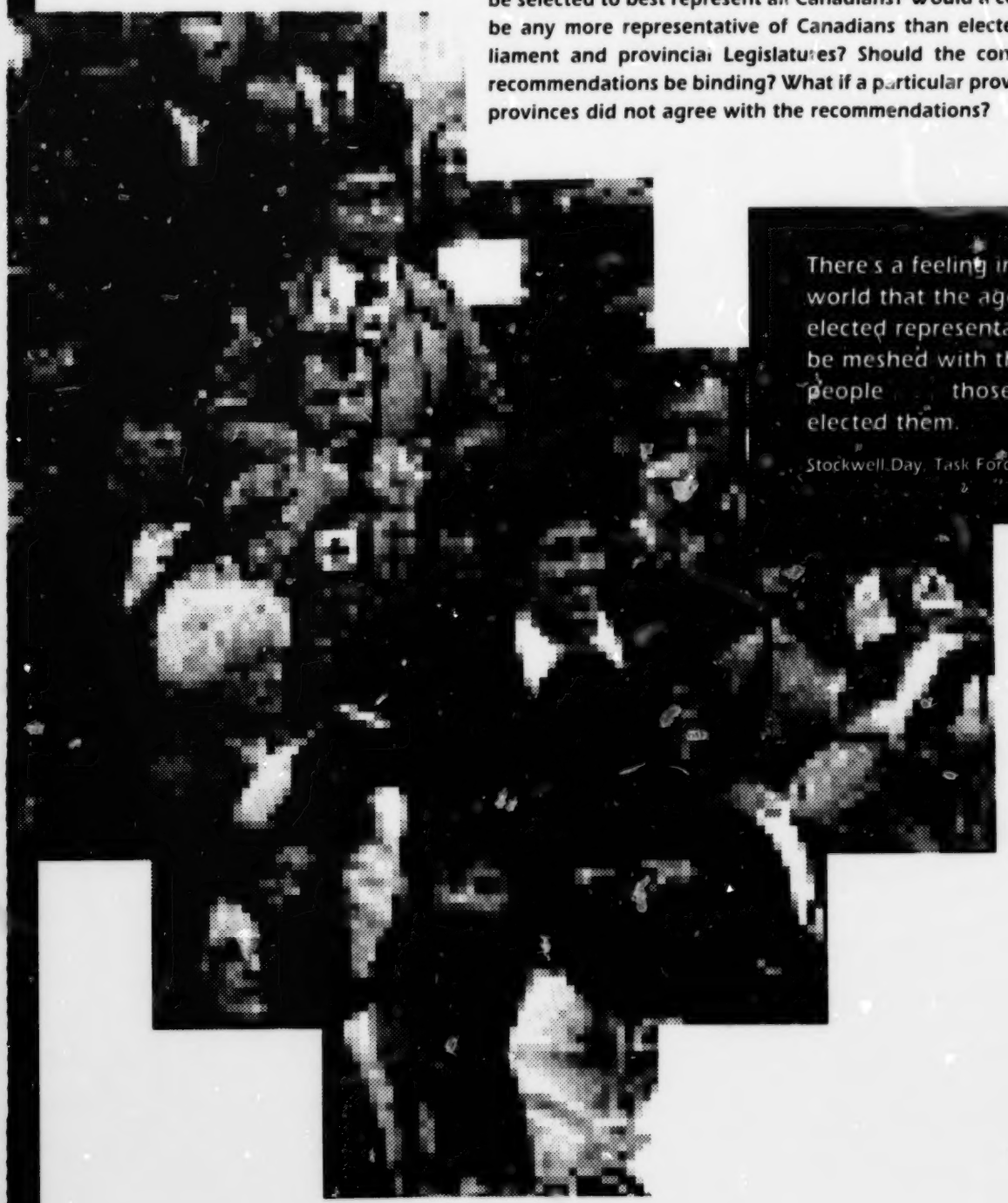
The amending formula could also be changed to provide for direct public approval by the use of referenda. While some federations such as Australia have incorporated referenda into the constitutional amendment process, Canada has had limited experience with this approach and has conducted only two national referenda — on prohibition in 1898, and conscription in 1942. In both instances, long-lasting divisions in Canadian society were highlighted because, while Quebecers rejected the proposals by a wide margin, they were approved in the rest of Canada. Far from achieving a national consensus for constitutional change, referenda can emphasize regional and cultural differences. Two provinces — Quebec and Ontario — could alone represent majority opinion in a national referendum.

Are referenda an appropriate approval mechanism in a federation as culturally and linguistically diverse as Canada? If referenda are to be the approval mechanism, would a simple national majority be needed? Would a national majority as well as majorities in a majority of provinces be required? Could an amendment that was rejected by a majority of voters from an entire region still be approved nationally? Could an amendment that affected one province more than the others be approved by a national majority through a referendum despite being rejected by that province?

Who would determine the timing and the actual wording of the referendum question, the federal government or the provinces? Would the specific text of the constitutional amendment be submitted to the people for approval, or could the referendum simply authorize governments to proceed with an amendment which received approval-in-principle?



Another suggestion for direct public involvement is through the establishment of constituent assemblies. These could be comprised of elected representatives, or members of the public, or both. **Who would be responsible for establishing a constituent assembly? How should its members be selected to best represent all Canadians? Would a constituent assembly be any more representative of Canadians than elected members of Parliament and provincial Legislatures? Should the constituent assembly's recommendations be binding? What if a particular province or a number of provinces did not agree with the recommendations?**



There's a feeling in the western world that the agenda of elected representatives has to be meshed with that of the people — those people that elected them.

Stockwell Day, Task Force Member

THE CHALLENGE

Asking some of these questions may cause some discomfort, but they need to be asked, alternatives weighed and potential solutions which may defy conventional wisdom suggested.

Dr. Peter Meekison, Vice-President, University of Alberta

There ought not to be any radical changes to the Constitution.

Dr. David Bercuson, Dean of Graduate Studies, University of Calgary

If we refuse to accept any changes at all, then I think it's unavoidable that Quebec will eventually leave - therefore the status quo is destroyed by refusing to move.

Dr. Ron Watts, Director, Queen's University Institute of Intergovernmental Relations

History gives us only a few opportunities to act on a scale that can significantly change the lives of many generations.

Fernand Landry, former Deputy Minister, Premier's Office, Government of New Brunswick

Canada is at a turning point. Its future is in the hands of all of us. The opinions of Albertans need to be heard.

Call **1-800-661-3741** with your ideas...or write down your thoughts on the page provided at the back of this discussion paper ... add more pages if you wish.

Mail your comments to:
The Constitutional Reform Task Force of Alberta
2200 - 10025 Jasper Avenue
Edmonton, Alberta, T5J 1S6

Contact **1-800-661-3741** for more information.

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APPENDIX

ALBERTA CONSTITUTIONAL REFORM TASK FORCE ROUNDTABLE MEETINGS

AN OVERVIEW OF FEDERALISM

October 26, 1990 - Edmonton

"Overview of Canadian Federalism"
-Dr. Ron Watts, Director, Queen's University Institute of Intergovernmental Relations.

"Evolution of Alberta's Position on the Constitution" - Dr. J. Peter Meekison, Vice President (Academic), University of Alberta.

DYNAMICS OF FEDERALISM

November 2, 1990 - Calgary

"Aboriginal Constitutional Issues"
- Mr. Andrew Bear Robe, Constitutional Advisor, Siksika Nation.

"The Charter of Rights and Freedoms"
- Professor Anne McLellan, Faculty of Law, University of Alberta.

"Institutional Reform" - Dr. David Elton, President, Canada West Foundation, and Professor, Department of Political Science, University of Lethbridge.

RESTRUCTURING FEDERALISM

November 23, 1990 - Calgary

"Historical Perspectives"- Dr. David Bercuson, Dean of Graduate Studies, University of Calgary.

"Atlantic Canada Perspectives" - Mr. Fernand Landry, former Deputy Minister, Premier's Office, Government of New Brunswick.

"Quebec Perspectives" - Ms. Lise Bissonnette, Publisher, Le Devoir.

"Western Canada Perspectives"
- Mr. Ted Byfield, Publisher, B.C. Report.

THE AMENDING PROCESS AND THE ECONOMICS OF FEDERALISM

November 30, 1990 - Edmonton

"The Amending Formula"
- Dr. Stephen Scott, Faculty of Law, McGill University.

"Public Participation in the Amendment Process" - Dr. Allan Tupper, Chairman, Department of Political Science, University of Alberta.

"Federalism and the Economy" - Dr. Robert Mansell, Department of Economics, University of Calgary.

"The Economics of the Constitution"
- Dr. Paul Boothe, Department of Economics, University of Alberta.